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No. 00-1520

In The Supreme Court of the United States

ANGELA G. McKENZIE,

Petitioner,

v.

SETA CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESTATEMENT OF QUESTION PRESENTED

Should this Court grant certiorari to answer the following question:

Because Petitioner failed to appeal the final judgment of the District Court, was the Court of Appeals correct in dismissing Petitioner's appeal for lack of jurisdiction?

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CORPORATE DISCLOSURE STATEMENT

Respondent SETA Corporation ("SETA") is a Virginia corporation. SETA has no parent corporations, and there are no publicly held companies that own 10% or more of SETA's stock.

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JURISDICTIONAL STATEMENT

SETA respectfully submits that this Court lacks jurisdiction over this case. SETA's position on this issue is set forth in its first argument below. Stated simply, however, the orders which Petitioner sought to appeal to the Court of Appeals were neither final nor appealable. Petitioner failed to appeal from the *final* order of the District Court which confirmed the arbitration award. That confirmation Order is the final judgment below. McKenzie's failure to appeal that final judgment was - - and remains -- jurisdictionally fatal.

STATEMENT OF THE CASE

Petitioner McKenzie ("McKenzie") correctly states that the United States Court of Appeals for the Fourth Circuit dismissed her appeal below for lack of jurisdiction. The basis for the ruling below was that the orders McKenzie sought to appeal are not designated as appealable under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, nor did they represent a "final decision" under the FAA.

As the Court of Appeals observed, the procedural history of this action is important because the timing and nature of certain motions and orders in the District Court affected whether appellate jurisdiction existed. While McKenzie attempted to note appeals of three orders of the District Court, she failed to appeal the *final* order which came after those prior three orders. The Court of Appeals determined that McKenzie's failure to appeal that *final* order mandated dismissal of her appeal for lack of jurisdiction. The

relevant[1] factual background is as follows:

McKenzie filed her Complaint against SETA in the District Court asserting statutory and tort claims arising from the termination of her employment. Based on the arbitration clause contained in the employment application McKenzie signed, SETA moved to compel arbitration. Following briefing and submission of various materials by the parties, as well as oral argument, the District Court issued its Order compelling arbitration (the "arbitrability Order"). Petition Appendix, pp. A8-A9. That arbitrability Order did *not* dismiss the case; to the contrary, it stayed the case pending arbitration, and directed counsel to submit periodic status reports to the District Court.

The parties then agreed that arbitration would be conducted under the aegis of the American Arbitration Association ("AAA") in accordance with the AAA's Rules for the Resolution of Employment Disputes ("AAA Rules").

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[1]SETA takes strong issue with McKenzie's version of the underlying "facts" of this case as set forth in her Petition. Given the jurisdictional dismissal of the appeal below, the Court of Appeals never addressed those factual issues, including the facts as found by the Arbitrator (which were in SETA's favor on all material issues). Accordingly, though we are mindful of Rule 15.2, the truth is McKenzie's mis-statement of "facts" does not have a bearing on the jurisdictional issue presented. That being said, SETA feels compelled to point out one glaring omission in the Petition: McKenzie's allegations of fraud against SETA and its counsel were the subject of a *second* lawsuit she filed in the District Court, which was *dismissed by* the District Court, and which dismissal was *affirmed* by the Court of Appeals. *McKenzie v. SETA, et al.*, No. 99-1778 (unpublished, 4th Cir., February 24, 2000), *rehearing and rehearing en banc denied*, May 31, 2000. McKenzie did not appeal that decision of the Court of Appeals. Thus, McKenzie's fraud allegations are completely baseless - - both factually and legally.

A Consent Order to that effect was submitted by the parties and entered by the District Court. *See* SETA Appendix, A:7 - A:8. AAA Rule 35(c) provides in its entirety:

> Parties to these procedures shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction.

Arbitration proceedings ensued. Per the AAA Rules, the parties selected an Arbitrator, Ira F. Jaffe, Esq. Mr. Jaffe is an attorney licensed in Virginia, Massachusetts and the District of Columbia, and has served as a full-time arbitrator/mediator specializing in the labor and employment area for more than 17 years, handling more than 2,000 cases.

During the pendency of the arbitration proceedings, McKenzie filed a motion in the District Court seeking to terminate the arbitration and to resume proceedings in the District Court. The District Court found no basis for disturbing the ongoing arbitration and stayed the case until the completion of arbitration. *See* SETA Appendix, A:9. As with its original arbitrability Order, the District Court again did *not* dismiss the action.

Following the conclusion of the arbitration proceedings, the Arbitrator issued his highly-detailed written opinion and Award (some 66-pages), which ruled in SETA's favor on all claims. Nevertheless, the Arbitrator assessed *all* Arbitrator fees (totaling $27,000) and *all* AAA costs (totaling more than $4,300) against SETA. SETA did not challenge that cost assessment, and instead promptly paid those sums.

McKenzie alleges that the Arbitrator was biased and demonstrated "manifest disregard" of applicable law,

including his allegedly mis-applying the relevant burden of proof analysis under Title VII. *See,* Petition, pp. 11, 13-14. The Award, however, begins with a 41-page recitation of the procedural background and facts (including the Arbitrator's various findings), and follows with a 14-page analysis and application of Title VII principles. Contrary to McKenzie's assertions, the Arbitrator specifically noted the governing standard; namely, that "There is employment discrimination whenever an employee's pregnancy is a motivating factor for the employer's adverse employment decision" (citing 42 U.S.C. § 2000e-2(m). Award, p. 42. After considering the evidence, including: (i) McKenzie's absenteeism (which the Arbitrator found to be "excessive by any reasonable measure," Award, p. 51); (ii) McKenzie's failure to establish that all of her 1996 absences were due to pregnancy-related illness; (iii) the "Monday/Friday" pattern of McKenzie's absences; (iv) McKenzie's absenteeism both at SETA and at her subsequent employer while not pregnant (which the Arbitrator described as "a clear picture of an employee who has frequent absences from work even during periods that she is not pregnant," Award, p. 16); (v) the fact that regular attendance was "clearly an essential requirement of the position" held by McKenzie at SETA, Award, p, 52; and (vi) the fact that there was no showing that SETA tolerated a similar pattern of absenteeism by any non-pregnant employees, Award, p. 51, the Arbitrator concluded, "For all these reasons, the claim of violation of Title VII/PDA due to discrimination on the basis of sex/pregnancy is rejected in its entirety." Award, p. 54.

Unhappy with the Award against her, McKenzie then filed in the District Court her "first" motion to vacate the Award (based on what she alleged was fraud by SETA and its counsel). In both her motion and its supporting memorandum, McKenzie made clear that this was the first of what would be two successive motions to vacate the Award, each based on separate alleged facts and theories. Included in McKenzie's filing was a formal "Notice to the Court" stating that, should the District Court grant her "first" motion to vacate, then her planned "second" motion to vacate would be unnecessary as being moot.

The District Court rejected McKenzie's fraud allegations and found that McKenzie was given a "full and fair hearing on all her claims in front of the Arbitrator." Accordingly, the District Court denied McKenzie's "first" motion to vacate by Order (and accompanying Memorandum Opinion) dated March 29, 1999 (the "first motion Order"). Petition Appendix, pp. A10-A13.

On April 6, 1999, McKenzie filed her "second" motion to vacate the Award (based on what she alleged was Arbitrator misconduct, including the Arbitrator's alleged bias and alleged "manifest disregard" of applicable law).[2] Meanwhile, on April 21, 1999 - - a mere 15-days later and prior to any hearing on McKenzie's "second" motion - -

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[2] In her Petition, McKenzie states she filed her "second" motion "[w]hile her First Motion was pending." Petition, p. 13. That statement is flatly false. As McKenzie admits, the District Court denied her "first" motion by Order filed March 29, 1999, Petition, p. 14, and yet McKenzie also admits her "second" motion was not filed until April 6, 1999. Petition, p. 13.

SETA filed its motion to confirm the Award. Hence, on April 21, 1999 and thereafter, two motions were simultaneously pending before the District Court: namely, McKenzie's "second" motion to vacate the Award and SETA's motion to confirm the Award.

McKenzie proceeded to file various - - and separate - - papers in connection with those two pending motions. On April 22, 1999, McKenzie filed a reply memorandum in support of her "second" motion to vacate. On April 30, 1999, McKenzie filed an opposition to SETA's motion to confirm contending, *inter alia,* that SETA's motion was *premature* because the District Court had not then ruled on McKenzie's pending "second" motion to vacate. In fact, McKenzie went so far as to state that for SETA to seek confirmation of the arbitration Award at that time "with full knowledge of plaintiff's pending ["second"] motion does not, in our view connote good faith."

The District Court denied McKenzie's "second" motion to vacate by Order (and accompanying Memorandum Opinion) dated April 30, 1999 (the "second motion Order"). Petition Appendix, pp. A14-A17. In so doing, the District Court squarely rejected McKenzie's allegations of Arbitrator bias and/or misconduct. The District Court added, "This Court is hesitant to allow the plaintiff the opportunity to re-litigate her case solely for the reasons that she is unhappy with the Arbitrator's outcome. To do so would render the binding process of the Arbitrator into a purely advisory one." *Id.* at A17

Subsequently, a hearing was held in the District Court on May 7, 1999 upon SETA's motion to confirm the Award.

Following the hearing, the District Court announced its decision and rationale from the bench[3], which later that same day were referred to and embodied in the District Court's Order dated May 7, 1999 confirming the Award (the "confirmation Order").[4] Petition Appendix, p. A18. This confirmation Order was the last Order entered by the District Court. Although McKenzie sought to appeal three prior Orders of the District Court (the arbitrability Order, the first motion Order and the second motion Order), she admits at page 16 of her Petition that **she never noticed an appeal of the final confirmation Order.**[5]

In the Court of Appeals, SETA filed a motion to dismiss McKenzie's appeal with respect to the first and second motion Orders on jurisdictional grounds, contending that such Orders were not appealable final orders, and that the only *final* order was the confirmation Order. The Court of Appeals granted SETA's motion by Order filed February 23, 2000. Petition Appendix, p. A7. By Order filed March 16, 2000, the Court of Appeals denied McKenzie's motion for *en*

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[3]McKenzie does not append to her Petition the transcript which contains the District Court's basis for its decision.

[4]McKenzie states that this confirmation Order was entered "[w]hile the appellate proceedings were in progress." Petition, p. 15. McKenzie states she filed her first Notice of Appeal on April 28, 1999. *Id.* The confirmation Order was, as McKenzie admits, filed on May 7, 1999. *Id.* We know of no "appellate proceedings" in the Court of Appeals between April 28 and May 7, 1999. McKenzie admits she did not even file her brief in the Court of Appeals until June 21, 1999. Petition, p. 16.

[5]We are at a complete loss as to what McKenzie means when she refers to this confirmation Order as a "*post-appeal* order of the district court." Emphasis added. *See* Petition, p. 16.

banc reconsideration thereof. *See* SETA Appendix, A:6.

McKenzie's appeals of the first and second motion Orders having been dismissed, and McKenzie not having appealed the confirmation Order, the *only* order which remained for consideration by the Court of Appeals was the original arbitrability Order. After briefing and oral argument, the Court of Appeals dismissed McKenzie's appeal from that Order as well on the same jurisdictional grounds.[6] Petition Appendix, p. A1-A5.[7]

McKenzie's Petition for Certiorari then followed.

SUMMARY OF ARGUMENT

These is nothing in this case which warrants review on certiorari. McKenzie is flat-out incorrect in alleging that

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[6]We disagree that SETA "conceded ... appellate jurisdiction" with respect to the arbitrability Order. *See* Petition, pp. 16, 18. By the motion to dismiss filed in the Court of Appeals, SETA merely first moved to dismiss the appeals as to the first and second motion Orders. McKenzie's "concession" allegation is thus factually false, and legally irrelevant in any event as a party simply cannot confer appellate jurisdiction by consent or waiver. *See, e.g., Ins. Corp. v. Compagnie Des Bauxites,* 456 U.S. 694, 702 (1982) ("... no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, *California v. LaRue,* 409 U.S. 109 (1972), principles of estoppel do not apply, *American Fire & Casualty Co. v. Finn,* 341 U.S. 6, 17-18 (1951), and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion.")

[7]McKenzie's Petition Appendix omitted page 2 of the decision (and included page 3 twice). For the convenience of the Court, a full copy of the decision is included in SETA's Appendix at A:1-A:5.

the certiorari considerations contained in Rule 10 are satisfied in this case. The question of "finality" of arbitration orders has already been authoritatively decided by this Court in *Green Tree Financial Corp.-Ala. v. Randolph*, 531 U.S. __ 99-1235 (December 11, 2000). Furthermore, McKenzie simply failed to follow proper procedure in order to appeal. The Orders which McKenzie sought to appeal are just not appealable orders under the FAA. Consequently, the Court of Appeals was correct in determining that it lacked appellate jurisdiction. Alternatively, the Orders which McKenzie sought to appeal were confirmed by the subsequent confirmation Order which was not appealed. Thus, review of the prior Orders would be foreclosed by final judgment and/or *res judicata* principles in any event.

ARGUMENT

I. Because Petitioner McKenzie failed to appeal the final judgment of the District Court, the Court of Appeals properly dismissed her appeal for lack of jurisdiction.

McKenzie erroneously asserts that this case is important because it implicates the Federal judiciary's alleged "supervision and control" of the arbitration process. Petition, p. 19. Not only does that allegation misconstrue the role of the Federal judiciary, but it is also incorrect. This case deals with appellate jurisdiction; the underlying arbitral process is simply not the issue at hand.

Section 16 of the FAA[8] sets forth the types of orders regarding arbitration which are - - and those which are not - - appealable. The Orders McKenzie sought to appeal are simply not among the appealable types.

We begin by examining whether any of the three Orders McKenzie sought to appeal are among those enumerated within the express terms of Section 16 as being appealable. None are.

The arbitrabilty Order compelled arbitration and stayed the litigation. It did not dismiss all or any portion of the case. To the contrary, by its terms, it directed counsel to provide periodic status reports. §16(b)(1) expressly *precludes* an appeal from that Order. Further, *Green Tree, supra* at fn. 2, authoritatively states:

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[8] § 16. Appeals. (a) An appeal may be taken from -
(1) an order-
(A) refusing a stay of any action under section 3 of this title,
(B) denying a petition under section 4 of this title to order arbitration to proceed,
(C) denying an application under section 206 of this title to compel arbitration,
(D) confirming or denying confirmation of an award or partial award, or
(E) modifying, correcting, or vacating an award;
(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or
(3) a final decision with respect to an arbitration that is subject to this title.
(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order -
(1) granting a stay of any action under section 3 of this title;
(2) directing arbitration to proceed under section 4 of this title;
(3) compelling arbitration under section 206 of this title; or
(4) refusing to enjoin an arbitration that is subject to this title.

> Had the District Court entered a stay instead of a dismissal in this case, that order would not have been appealable. 9 U.S.C. § 16(b)(1).

Clearly, the arbitrability Order was not appealable.

Likewise, the first and second motion Orders are not within any of the types of Orders for which Section 16 expressly permits an appeal. Those Orders *denied* motions to vacate. As to a motion to vacate, §16(a)(1)(E) only permits an appeal from an order which *vacates* an award. Clearly again, therefore, neither the first nor second motion Orders are appealable under the express terms of Section 16.

McKenzie apparently concedes that the foregoing Orders fail to satisfy the express terms of Section 16, and thus she must necessarily argue that *each* such Order is "a final decision with respect to an arbitration" under §16(a)(3). Again, clearly none are. But before addressing the specifics of that untenable argument, we will first address the conceptual framework from which that argument emanates.

McKenzie argues that Section 16 creates a "parallel scheme" of appellate procedures; the distinction allegedly being that there is one scheme for parties aggrieved by an arbitration award, and another scheme for parties favored by an arbitration award.[9] Petition, pp. 20-25. McKenzie cites neither legislative history nor any decisional authority for that

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[9]McKenzie also makes much of the different time frames the FAA provides for filing motions to vacate versus motions to confirm in the District Courts. *See* Petition, p. 20. Those time frames are matters of legislative judgment having absolutely nothing to do with the appellate jurisdiction issue presented here.

proposition. To the contrary, as *Green Tree* instructs, Section 16 preserves appeal of any "final decision with respect to an arbitration" *regardless* of whether the decision is favorable or hostile to arbitration. 121 S.Ct. at 519.

Moreover, the text of Section 16 belies McKenzie's assertion. Under § 16(a)(1)(D), for example, an order which *either* confirms *or* denies confirmation of an award *is* appealable. Who prevailed is irrelevant to appealability.[10] What Section 16 does is create a *unified* appellate scheme, with very clear rules. Conceptually speaking, those rules are that orders favoring arbitration are not appealable until the very end of the case, while orders precluding or staying arbitration are immediately appealable. Section 16 addresses *types* of orders, not *who prevails.* In short, Section 16 reflects the FAA's "statutory policy of rapid and unobstructed enforcement of arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 23 (1983).

Further, McKenzie's position is that there can be multiple "final judgements" (emphasis added) in the District Court, thereby allowing multiple appeals (presumably, a separate appeal from each such alleged separate final judgment in a case). Petition, p. 23. McKenzie's premise would allow separate (and presumably limitless) appeals from

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[10]The FAA is likewise outcome-neutral as to who can move to confirm an award (*see* Section 9 which states that "*any* party to the arbitration" may move for confirmation). While admittedly the prevailing party is the party most likely to do so, the point is McKenzie is simply wrong in stating that the text of the FAA creates "parallel, distinct and separate" procedures, Petition, p. 20, based on who prevailed in arbitration.

separate (and presumably limitless) District Court orders.[11] Again, McKenzie cites no authority for this novel - - and we submit unsupportable - - proposition. In this case, McKenzie filed and lost two separate motions to vacate, each bottomed on separate matters. She apparently is of the view that each is "final" and each is appealable. Were that the law, a party who is unhappy with an arbitration award could file as many motions to vacate (or to modify, or to correct, etc.) as his/her imagination could concoct, proceed separately as to each on motions practice in the District Court, and appeal all adverse decisions *seriatim*. Such is simply not the law. As Justice Frankfurter wrote for a unanimous Court in *Cobbledick v. United States*, 309 U.S. 323, 325 (1940):

> Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment.

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[11]Were that the case, then necessarily the "final judgment" of the Court of Appeals as to the first and second motion Orders would be the decision which dismissed the appeals from those Orders. Yet McKenzie states that the "final judgment" - - singular - - of the Court of Appeals was that Court's last Order which only dismissed the arbitrability Order. McKenzie's position is thus not only internally inconsistent, but would also have the effect of making her Petition untimely as to the first and second motion Orders under 28 U.S.C. § 2101(c) and Rule 13.

> To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause.

Apart from misapprehending the text and purpose of the FAA's appellate scheme, McKenzie blithely ignores this Court's precedent. While McKenzie cites the *Green Tree* decision, she nowhere addresses this Court's discussion in Part II of *Green Tree* concerning the finality of orders regarding arbitration. This Court authoritatively determined that the term "a final decision with respect to an arbitration" under Section 16(a)(3) of the FAA is to be accorded its "well-established meaning." In this Court's words (quoting *Catlin v. United States,* 324 U.S. 229, 223 (1945)):

> ...the term 'final decision' has a well-developed and longstanding meaning. It is a decision that 'ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment.'

This is the precise basis, and indeed the precise quote the Court of Appeals cited and applied in dismissing McKenzie's appeal. *See*, SETA Appendix, p. A-4.[12]

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[12]*See also* Fed. R. App. Proc. 28 (a)(4)(D) (the appellant's brief must contain "an assertion that the appeal is from a final order or judgment that disposes of all parties' claims"). Clearly, SETA's claim for judicial confirmation of the arbitration Award was not disposed of - - and was in fact resisted by McKenzie - - until the confirmation Order was entered. McKenzie's designation of the three prior Orders as the Orders being appealed from limited the jurisdiction of the Court of Appeals to those Orders. *See* Fed. R. App. Proc.3(c) (a notice of appeal "must: ... designate the judgment, order or part thereof being appealed").

By definition then, there can only be ***one*** such "final decision" in a case.[13] The question is, in this case, which Order is the "final decision"? The answer is plain - the confirmation Order, which was the last Order in time, as well as the last Order in substance. It - - and no other Order - - "ended the litigation on the merits."

The arbitrability Order clearly did not terminate the litigation in the District Court. It dismissed nothing, and merely stayed the case pending the outcome of arbitration.

Likewise, the first motion Order did not terminate the litigation. McKenzie herself formally notified the District Court that she was preparing a second motion to vacate which would be predicated on separate grounds.

Similarly, the second motion to vacate did not terminate the litigation. It was but 1 of 2 then-competing motions, the other being SETA's motion to confirm the arbitration Award. Even there, McKenzie resisted SETA's confirmation motion as being "premature" given her then-pending second motion to vacate. McKenzie's position was that her second motion to vacate should be decided first, and *then* the District Court should address - - separately - - SETA's motion to confirm. In fact, that is precisely what the District Court did. McKenzie therefore cannot seriously argue that the District Court's decision on her second motion to vacate was somehow the "final" order.

In contrast to the Orders which McKenzie argues are

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[13]Of course, the District Court may expressly direct entry of a final judgment as to one or more but fewer than all claims in a case. *See* Fed. R. Civ. Proc. 54(b). McKenzie does not allege that occurred in this case.

"final," the District Court's confirmation Order which confirmed the arbitral Award did of its own force terminate the litigation. Because of it, and only because of it, nothing further remained for the District Court to do. That confirmation Order constitutes the final judgment in this case. McKenzie, however, failed to appeal that *final* Order. Consequently, appellate jurisdiction over the earlier Orders is utterly lacking.

By attempting to notice appeals with regard to the prior Orders, McKenzie sought to obtain exactly what the final judgment rule is intended to preclude - - piecemeal disposition of decisions on appeal. *See Catlin,* 324 U.S. at 233-34. Piecemeal appeals are precluded, *inter alia*, because a final decision in a case by the District Court may preclude the need for any appeal at all. *See Cheng v.C.I.R.*, 878 F.2d 306, 310, n.5 (9th Cir. 1989) ("final disposition in the trial court, by way of settlement or ultimately acceptable judgment, may preclude any appeal at all"). In addition, permitting separate reviews of the component elements of a final decision unnecessarily burdens judicial administration by the Courts of Appeal. *See Stringfellow v. Concerned Neighbors in Action,* 480 U.S. 370, 380 (1987) (noting that the finality rule protects a variety of interests that contribute to the efficiency of the legal system, including minimizing disruption, delay and litigation expenses, and review of issues that may become moot or irrelevant would burden appellate courts).

Unbelievably, McKenzie argues that the decision of the Court of Appeals is in "direct conflict" with this Court's decision in *First Options of Chicago, Inc. v. Kaplan,* 514 U.S.

938 (1995) [mis-cited by McKenzie as being in *513* U.S.]. Several responses are in order.

First, even if McKenzie's "direct conflict" allegation was true (which is not the case), this Court's decision in *Green Tree, supra,* would have superceded any prior decision.

Second, the alleged full quotation from *First Options* cited by McKenzie at page 26 of her Petition does not appear in the decision itself, but rather appears to be from a headnote (and perhaps that explains why McKenzie fails to cite a specific page reference).

Third and in any event, the appellate standard of review issue is obviously different from the issue of appealability *vel non.* The issues in the *First Options* simply have nothing to do with the appellate jurisdiction issue presented here. The issues in *First Options* were, in this Court's own words: "The first question is the standard of review applied to an arbitrator's decision about arbitrability" 514 U.S. at 942, and second, "We turn next to the standard a court of appeals should apply when reviewing a district court decision that refuses to vacate or confirms an arbitration award." (Internal citations omitted.) *Id.* at 947. The first issue was a "who decides" one. The second issue was whether "ordinary" review standards should be applied (*i.e.,* findings of fact being reviewed under the "clearly erroneous" standard but deciding questions of law *de novo*) or rather "a specially lenient 'abuse of discretion' standard (even as to questions of law)... ." 514 U.S. at 948. Neither issue is at play in this case.

McKenzie is equally incorrect in suggesting that Courts of Appeal routinely exercise jurisdiction over District Court orders denying motions to vacate - - thereby implying that such jurisdiction is exercised regardless of the *finality* of any such order. Petition, p. 28. In *none* of the decisions cited by McKenzie was the order denying the motion to vacate followed by a confirmation order - - which is the instant case. In fact, McKenzie's cited cases do not even address appellate jurisdiction (other than the Third Circuit decision in *Kaplan v. First Options,* 19 F.3d 1503, 1509 (3rd Cir. 1994) which finds jurisdiction based on an Order *confirming* an award). In short, none of McKenzie's cited cases render orders denying motions to vacate *per se* final, and therefore *per se* appealable.

McKenzie simply fails to comprehend the straight-forward two-step analysis governing appealability of orders under the FAA; namely, first, is the order presented one that is expressly enumerated as being appealable under Section 16 (and even McKenzie does not argue that the answer to that question in this case is "yes"); and if not, then second, is the order presented "a final decision with respect to an arbitration" (as defined in *Green Tree, supra)*? In this case, the only Order which "end[ed] the litigation on the merits" was the final confirmation Order - - period. In contrast, when there is an order which is *expressly* appealable under the FAA, such as an order confirming an award, it is appealable even if it is *not* the final judgment. *See Hewlett-Packard Co., Inc. v. Berg,* 61 F.3d 101 (1st Cir. 1995). Orders which are *not* expressly appealable must therefore satisfy finality requirements. *See* Wright, Miller & Cooper, *Federal*

Practice and Procedure Jurisdiction 2d, § 3914.16, p. 36 (1992) (§ 16 does not list all orders that Courts may make with respect to arbitration and the "[f]inal judgment doctrine remains to fill the gaps.")

Three further arguments of McKenzie deserve brief mention, even though they are somewhat afield from the jurisdictional issue presented.

First, McKenzie argues there was "no ... agreement" between the parties so as to allow confirmation of the Award under Section 9 of the FAA. Petition, p. 22. As noted in our Statement of the Case, *supra* at 2-3, the parties *agreed* in a Consent Order that the arbitration would be conducted under the AAA's Rules. *See* SETA Appendix, A:7-A:8. AAA Rule 35(c) expressly provides:

> Parties to these procedures shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction.

McKenzie's assertions that there was "no such agreement" is simply false. SETA had every right to seek confirmation.

Second, McKenzie also attempts a policy-type argument contending that a party who prevails in arbitration could wait as long as 1-year to seek confirmation, and thus have some form of "veto power" over the other party's appeal rights. Petition, p. 25. Whatever may be the possible time frames in other cases, the fact is that in *this* case, the parties were pursuing competing motions at the *same* time (*i.e.*, McKenzie's "second" motion to vacate and SETA's motion to confirm). McKenzie's speculation as to possibilities in other cases has no bearing on *this* case. Further, SETA did

not delay, or otherwise act in any fashion which sought to "veto" McKenzie's right to appeal. As noted previously, McKenzie's "first" motion to vacate gave advance notice that a "second" motion" to vacate was on the horizon. Promptly following McKenzie's filing of her "second" motion, SETA filed its motion to confirm (in fact, within the ensuing 15 days). Even then, McKenzie accused SETA of being *premature.* One wonders how, then, McKenzie believes SETA should have proceeded in its efforts to obtain confirmation. The fact is SETA moved as expeditiously as possible, especially in light of McKenzie's *seriatim* approach.

Thus, McKenzie herself was the party who elected to proceed in a *seriatim* fashion. She started with her "first" motion to vacate; after losing that, she proceeded with her "second" motion to vacate; and in response to SETA's motion to confirm, she argued that SETA was "premature" as the District Court, according to her, should first rule on her "second" motion to vacate before addressing SETA's motion to confirm (which is exactly what the District Court did). The *finality* of the confirmation Order in this case is due in large measure to McKenzie's own actions.

McKenzie also contends that the denial of her "first" motion to vacate was, to the extent it was based on Rule 60(b)(3) of the Federal Rules of Civil Procedure, within the "plenary jurisdiction" of the Court of Appeals (apparently being of the view that somehow a Rule 60(b) motion in an arbitration case precludes the application of Section 16 of the FAA and instead triggers the "plenary" jurisdiction of 28 U.S.C. § 1291). Petition, pp. 28-30. Once again, however, McKenzie neither explains why this is allegedly so, nor

provides decisional authority for her proposition. In fact, however, 28 U.S.C. § 1291 provides only that the Courts of Appeal have jurisdiction of appeals from all "*final* decisions" of the District Courts. As *Green Tree, supra,* instructs, the term "final decision" is not unique to arbitration and has a long-standing and well-understood meaning. *See also,* Wright, Miller & Cooper, *Federal Practice and Procedure Jurisdiction 2d*, § 3914.17, p. 8 (1992) ("there is no reason to attempt to live with separate rules of finality for the different statutes.") Moreover, there is nothing in 28 U.S.C. § 1291 which provides for any special treatment in reviewing a Rule 60(b) motion. In short, McKenzie's arguments again remain wanting.

Stated simply, by ignoring the final judgment rule and by failing to notice an appeal with respect to the final judgment entered by the District Court, McKenzie failed to perfect any appeal whatsoever. Had McKenzie instead appealed the *final* judgment of the District Court, she would have sufficiently preserved her right to appeal with regard to all prior orders intertwined with the final judgment. She simply failed to do so. Consequently, the Court of Appeals was plainly correct in dismissing McKenzie's appeal for lack of jurisdiction.

II. The confirmation Order which confirmed the arbitration Award was not appealed by McKenzie and is therefore final and not reviewable under final judgment and/or *res judicata* principles.

Even assuming *arguendo* that the Orders McKenzie sought to appeal were reviewable under the FAA, the issues involved therein became moot once she failed to appeal the confirmation Order which confirmed the arbitral Award. By the confirmation Order, the District Court approved the results of the arbitration and, under §§ 9 and 13 of the FAA, effectively entered judgment on the Award. That judgment has not been appealed. Consequently, review of that judgment is precluded under final judgment and/or *res judicata* principles. *See Federated Dept. Stores, Inc. v. Moitie,* 452 U.S. 394 (1981).

CONCLUSION

As we have shown, there is nothing in this case which warrants review on certiorari. There is nothing in the decision of the Court of Appeals in disharmony with either this Court's decisions or with decisions from other Circuit Courts. The law of finality of orders is well-established, and the recent *Green Tree* decision makes that established body of law applicable to appeals under the FAA. We submit that none of the considerations governing review on certiorari under Rule 10 are met, nor is any substantial question of import presented. This is a clear, simple case where a party

simply failed to do what was required to perfect an appeal. Accordingly, and for the foregoing reasons, Respondent SETA Corporation respectfully requests that McKenzie's Petition for A Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

ANGELA G. MCKENZIE,
Plaintiff-Appellant,

v.

SETA CORPORATION,
Defendant-Appellee.

No. 99-1576

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, Chief District Judge.
(CA-97-1038)

Argued: November 3, 2000

Decided: December 8, 2000

Before WIDENER, MICHAEL, and MOTZ, Circuit Judges.

Dismissed by unpublished per curiam opinion.

COUNSEL

ARGUED: Wendu Mekbib, LAW OFFICES OF WENDU MEKBIB, Vienna, Virginia, for Appellant. Richard Mark Dare, REED, SMITH, HAZEL & THOMAS, L.L.P., Falls Church, Virginia, for Appellee. **ON BRIEF:** Michael C. Montavon, MICHAEL C. MONTAVON, P.C., Fairfax, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

After Angela McKenzie was discharged from her job by SETA Corporation (SETA), she sued her former employer asserting Title VII sex discrimination and several state law claims. The district court granted SETA's motion to compel arbitration as provided for in McKenzie's employment application. After the arbitrator dismissed all of McKenzie's claims, McKenzie twice moved the district court to vacate the arbitral award. The district court denied McKenzie's motions to vacate and granted SETA's motion to confirm the award. McKenzie appealed the district court's orders compelling arbitration and denying her motions to vacate. We previously dismissed for lack of jurisdiction that portion of McKenzie's appeal challenging the orders denying her motions to vacate. The remaining portion of McKenzie's appeal, which challenges the district court's order compelling arbitration, must also be dismissed for lack of jurisdiction.

I.

On February 20, 1995, McKenzie began working for SETA in McLean, Virginia. SETA provides information technology systems and services to federal government agencies and other clients. SETA hired McKenzie as an executive secretary and later promoted her to the proposal production staff. In February 1995 McKenzie became pregnant, but she suffered a miscarriage soon thereafter. SETA allowed her to be absent from work for several days for recuperation. In December 1995 McKenzie became pregnant again. Because this pregnancy was plagued with complications, she missed many days of work. McKenzie explained the reasons for her absences to her supervisors. After several months, on April 12, 1996, when McKenzie was absent from work due to illness, SETA discharged her, stating that a "reduction in the proposal staff" was the reason.

On October 2, 1996, McKenzie filed a formal charge with the Fairfax County Human Rights Commission, alleging sex and pregnancy discrimination in SETA's decision to terminate her. The Human Rights Commission issued her a notice of right to sue. McKenzie subsequently filed this action in federal court, alleging sex discrimination in violation of Title VII of the Civil Rights Act of 1964, wrongful discharge, intentional infliction of emotional distress, and breach of contract. SETA moved to compel arbitration on the ground that McKenzie had signed an employment application that included an arbitration clause. The application provided:

> I understand and agree to the following:
>
> . . . .
>
> . . . I understand that all controversies, claims, and/or disputes arising out of the termination of my employment with SETA Corporation shall be settled exclusively through binding arbitration.

The district court granted SETA's motion and stayed the case pending the completion of arbitration. The parties proceeded with arbitration, and on January 6, 1999, the arbitrator dismissed all of McKenzie's claims against SETA. In particular, the arbitrator concluded that McKenzie had not proven that SETA terminated her because of her pregnancy. SETA was required to pay the arbitrator's compensation and the other expenses of arbitration.

At this point, the procedural history of this action becomes important because the timing and nature of certain motions and orders in district court affect whether we have jurisdiction to hear this appeal. On March 8, 1999, McKenzie filed a motion to vacate the arbitral award, arguing that SETA fraudulently induced her to sign the employment application by concealing its (SETA's) knowledge that nonlawyers do not understand arbitration clauses. The district court denied the motion on March 29, 1999, reasoning that SETA's conduct did not rise to the level of fraud. On April 6, 1999, McKenzie filed a second motion to vacate the arbitral award, claiming that the arbitrator displayed partiality and a manifest disregard for the law by requiring direct evidence of SETA's discriminatory intent. On April 21,

1999, before the district court ruled on the second motion to vacate, SETA moved to confirm the arbitral award. On April 28, 1999, McKenzie noted an appeal from the district court's March 29, 1999, order denying her first motion to vacate and from the court's August 22, 1997, order compelling arbitration. On April 30, 1999, the district court denied McKenzie's second motion to vacate, concluding that she had failed to show actual bias on the part of the arbitrator and that the arbitrator's misapplication of the law is not a ground for vacating his award. On May 5, 1999, before the district court ruled on SETA's motion to confirm, McKenzie filed an amended notice of appeal, noting an appeal from the order denying her second motion to vacate. Two days later, on May 7, the district court entered an order confirming the arbitral award. McKenzie did not take an appeal from the confirmation order.

After McKenzie filed her briefs in our court, SETA moved to dismiss, for lack of jurisdiction, McKenzie's appeal insofar as it challenged the orders denying the motions to vacate. SETA argued that these orders are not appealable under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16. The FAA provides that an appeal may be taken from, among other things, an order "confirming or denying confirmation of an award or partial award," an order "modifying, correcting, or vacating an award," and "a final decision." 9 U.S.C. § 16(a). A final decision is one that "'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Stedor Enters., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 731 (4th Cir. 1991) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). SETA argued that the orders *denying* the motions to vacate do not fall into any of the enumerated categories, nor are they final decisions because the litigation here continued and the district court still had something to do, that is, confirm the arbitral award. Therefore, according to SETA, the district court's "final decision" was rendered on May 7, 1999, when it confirmed the arbitral award. The confirmation order was an appealable order, but McKenzie failed to take an appeal from that order. We accepted SETA's argument and dismissed McKenzie's appeal with respect to the two orders denying the motions to vacate. *See McKenzie v. SETA Corp.*, No. 99-1576 (CA-97-1038) (4th Cir. Feb. 23, 2000). Accordingly, all that remains in the present appeal is McKenzie's challenge to the district court's order compelling arbitration.

II.

McKenzie asserts that she is entitled to a trial by jury and that the district court should not have ordered the parties to resolve their dispute through arbitration. She first argues that the arbitration clause only said that she "understands" that all disputes are to be settled by arbitration, but the clause did not say that she "agrees" to such arbitration. Second, McKenzie claims that SETA fraudulently induced her to sign the employment application by hiding from her the company's knowledge that nonlawyers do not understand the meaning of arbitration. SETA responds on the merits, but it also argues that McKenzie's appeal should be dismissed because she failed to appeal from the confirmation order, the only appealable order in this case.

In an earlier order we dismissed McKenzie's appeal from the orders denying her motions to vacate the arbitration award. Those orders are not designated as appealable under the FAA, nor do they represent a "final decision" under the Act. *See* 9 U.S.C. § 16(a). We also have no choice except to dismiss the remaining portion of McKenzie's appeal. The one remaining order that McKenzie seeks to challenge, the interlocutory order granting the motion to compel arbitration, is not by itself an appealable order. *See id.* § 16(b)(3). In order to challenge it, McKenzie must have noted an appeal from a final decision or from an order designated as appealable under the FAA. *See F.C. Schaffer & Assocs. v. Demech Contractors, Ltd.*, 101 F.3d 40, 42-43 (5th Cir. 1996) ("[T]his court lacks jurisdiction to review the district court's decision regarding the arbitrability of the parties' dispute until there is an appealable, *i.e.* final, order."). Because there is no appealable order before us, we are without jurisdiction.

We would have jurisdiction if McKenzie had appealed from the confirmation order. At the time she filed her amended notice of appeal on May 5, 1999, she knew that SETA's motion to confirm the arbitral award was pending. Nevertheless, she chose to proceed with her appeal at that time. Two days after McKenzie filed her amended appeal, the district court issued its final decision, an order confirming the award. Because McKenzie did not note an appeal from that order, we must dismiss the remainder of this appeal for lack of jurisdiction.

DISMISSED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED March 16, 2000

No. 99-1576

CA-97-1038

ANGELA G. MCKENZIE

Plaintiff - Appellant

v.

SETA CORPORATION

Defendant - Appellee

ORDER

Appellant filed a motion for en banc reconsideration of the partial dismissal of the appeal for lack of jurisdiction.

As no member of this Court or the panel requested a poll on the suggestion for en banc reconsideration.

IT IS ORDERED that the motion for en banc reconsideration is denied.

For the Court,

/s/ Patricia S. Connor

CLERK

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ANGELA G. McKENZIE,	)	
Plaintiff,	)	
v.	)	C.A. No. 97-1038-A
SETA CORPORATION,	)	
Defendant.	)	

CONSENT ORDER

IT APPEARING to the Court that the parties have agreed to submit this dispute to arbitration under the aegis of the American Arbitration Association ("AAA") in accordance with the AAA's Rules for the Resolution of Employment Disputes,

AND IT FURTHER APPEARING to the Court that Plaintiff has requested additional time to pay the necessary filing fee of the AAA and that defendant has no objection to such an extension of time, and it appearing proper to the Court to do so, is accordingly

ORDERED THAT THIS COURT'S ORDER DATED AUGUST 22, 1997 IS HEREBY MODIFIED AS FOLLOWS:

1. Plaintiff shall file her claims or demands with the AAA, including any required filing fees of the AAA, on or before October 22, 1997.

2. This case remains **STAYED** for one-hundred eighty (180) days from October 22, 1997, during which time the case shall be arbitrated.

3. The parties shall submit to the Court a joint status report upon the plaintiff's filing with the AAA and every sixty (60) days thereafter until the stay expires.

The Clerk is **DIRECTED** to send a copy of this Consent Order to counsel for the parties.

It is so **ORDERED.**

Date September 15, 1997.

/s/ Leonie M. Brinkema
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ANGELA G. McKENZIE,	)	
Plaintiff,	)	
v.	)	Civil Action No. 97-1038
SETA CORPORATION	)	
Defendant.	)	

ORDER

This matter comes before the Court on Plaintiff's motion for resumption of judicial proceedings. It appearing to the Court that there is no basis for disturbing the ongoing arbitration, it is hereby

ORDERED that Plaintiff's motion is DENIED, this matter is STAYED until the completion of arbitration and the parties are directed to return to arbitration.

/s/ Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
April 30, 1998